No. 87-6571

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DETHORNE GRAHAM,

Petitioner,

v.

M. S. CONNOR, et al,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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PETITIONER'S REPLY BRIEF

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*H. GERALD BEAVER and
RICHARD B. GLAZIER
Beaver, Thompson, Holt
& Richardson, P.A.
806 Hay Street
P.O. Box 53247
Fayetteville, NC 28305
Telephone: (919) 323-4600
Counsel for Petitioner

**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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ARGUMENT

I. THE RECORD CONTAINS AMPLE EVIDENCE, WHEN COMBINED WITH REASONABLE INFERENCES ARISING THEREFROM, TO SUPPORT FINDINGS THAT DURING THE INCIDENT IN QUESTION PETITIONER WAS SUFFERING FROM AN INSULIN REACTION, RESPONDENTS WERE AWARE OF THIS CONDITION, RESPONDENTS PARTICIPATED IN THE UNCONSTITUTIONAL SEIZURE OF PETITIONER, AND AS A RESULT OF THIS UNCONSTITUTIONAL SEIZURE, PETITIONER SUFFERED DAMAGES.

Respondents dispute several portions of Petitioner's statement of facts as being without support in the record. Respondents' contentions are without merit.

A. The Insulin Reaction

Initially, Respondents allege the record lacks competent evidence to support a finding Petitioner was suffering from an insulin reaction at the time of the alleged unconstitutional seizure. During his testimony, Petitioner stated that Berry could recognize when he was "going into" an insulin reaction. (J.A. 12). He then unambiguously described the date of the incident as being the day upon which "I had that insulin reaction." (J.A. 27). On cross-examination, Petitioner described the symptoms of insulin reaction and the recommended treatment therefor. (Tp. 46-47). Dr. Saxe confirmed these symptoms as being consistent with those of insulin reaction. (J.A. 33-34).

In any event, in its order directing verdict for Respondents, the District Court found as a fact that Petitioner, at the time of the incident in question, had suffered a diabetic insulin reaction. (J.A. 55-56). This finding has never been challenged by Respondents and as such is deemed to be correct before this Court. *See Anderson* v. *Bessemer*

City, 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985).

B. The Knowledge And Participation Of Respondents

Respondents next contend the record lacks evidence that Respondents knew of Petitioner's condition at the time of the seizure. To the contrary, the record is replete with evidence that all Respondents were informed of Petitioner's condition early on in the encounter and displayed willful indifference to his pleas for help.

Berry testified that at the initial stop he informed Respondent Connor that Petitioner might be having an insulin reaction. (J.A. 39). One of the Respondent police officers commented, "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M.F. but drunk. Lock the S.B. up." (J.A. 42). This statement clearly implies knowledge on the part of that officer that Petitioner was allegedly having an insulin reaction.

Evidence was received demonstrating that Charlotte police officers were given training to aid them in recognizing the symptoms exhibited by Petitioner as being indicative of insulin reaction. (Tp 60, Pls. Trial Ex. 3). Further, when Petitioner asked one of the officers to retrieve his diabetic decal, he was told to shut up and his head was slammed into the hood of Mr. Berry's car. (J.A. 17, 45). When Petitioner asked one of the officers for orange juice to counteract the insulin reaction, she responded, "I'm not giving you shit." (J.A. 18, 20, 43).

Additionally, in Paragraph 6 of his complaint, Petitioner alleged all Respondents were present at the time of the incident and were informed of Petitioner's condition. (J.A. 3). In their responsive pleading, these allegations

were not denied (J.A. 8), and thus under Fed. R. Civ. P. 8(d) are deemed admitted.

In what can only be described as a disingenuous argument, Respondents deny the evidentiary support for Officer Rice's involvement in the incident pointing to references to "Mr. Wright" that appear in the record. It is patently obvious from the absence of any party named "Wright" and the absence of any other reference in the record to such a named person that the appearance of the name "Wright" in the transcript represents a phonetic misspelling by the court reporter of Berry's references to the Respondent Rice. This conclusion is amply supported by Petitioner's testimony identifying all four officers by name (J.A. 28-29), and the District Court's findings of the presence and participation of Respondents in the incident. (J.A. 49).

C. Petitioner's Damages

Finally, Respondents challenge the sufficiency of evidence, in the light most favorable to the Petitioner, to show resulting damages. Petitioner testified handcuffs were placed upon him too tightly, his face was slammed into the hood of a car, and he was thrown into a police car like a sack of potatoes. (J.A. 17). When asked what he felt when his head was pushed against the car, he responded, "My head was throbbing so bad . . . just shock and pain." *Id.* After being released by Respondents, he realized "they broke my foot." (J.A. 20). He underwent medical treatment, incurred medical expenses, and discovered that he had two broken bones in his foot. (J.A. 21-22). He missed 5½ weeks of work, suffered a scrap over his left eye, cuts on his wrist, and pain in his right shoulder. (J.A. 22-23). His shoulder hurt three to four months, his hands

were numb, and he suffered a ringing in his ears which was still present at the time of trial. *Id.*

This evidence and the reasonable inferences arising therefrom would support findings that each of these injuries were proximately caused by the actions of Respondents in unreasonably seizing Petitioner in violation of his Fourth Amendment rights.[1]

II. THE ALLEGED PARTICIPATION OF THE RESPONDENTS IN THIS INCIDENT IS SUFFICIENT TO SUBJECT EACH TO JOINT AND SEVERAL LIABILITY.

Respondents take the position that in order to be subjected to responsibility and liability for this incident, each officer must have personally participated in *every* act which constituted the constitutional violation. This argument is clearly at odds with existing law and is patently incorrect.

In his complaint, Petitioner alleges joint participation of Respondents and his claim for relief requests joint and several liability. While it is true that due to his unconsciousness, Petitioner cannot precisely testify as to which officer did which act, Respondents should not be heard to argue that this relieves them from responsibility. "They may as well argue that no one on a firing squad is responsible for the victim's death until we know whose bullet first

[1] Respondents imply Petitioner inflicted his own injuries by resisting the actions of Respondents, thus, he should be denied recovery. Even if so injured, which is denied, recovery is not barred. Under North Carolina law, Petitioner had the absolute right to resist the officers' actions, *State* v. *Mobley*, 240 N.C. 476, 83 S.E.2d 100 (1954); *State* v. *Williams*, 32 N.C. App. 204, 231 S.E.2d 282, *appeal dismissed*, 292 N.C. 470, 233 S.E.2d 924 (1977); N.C. Gen. Stat. § 15A-401(b), and Respondents should not be heard to complain that Petitioner was injured while resisting their unlawful assault on him.

struck the heart." *See Grandstaff* v. *City of Borger*, 767 F.2d 161, 168 (5th Cir. 1985).

Under these circumstances, the burden shifts to Respondents to show which among them did not participate in the incident, if any claims such to be the fact. *See Restatement [Second] of Torts*, § 433(b); *Summers* v. *Tice*, 33 Cal.2d 80, 199 P.2d 1 (Cal. 1948), *en banc). See also Rutherford* v. *City of Berkeley*, 780 F.2d 1444, 1448 (9th Cir. 1986) (Presence and participation in arrest infers participation in excessive force). Further, officers, unlike civilians, have an affirmative duty to enforce the law. That duty includes an obligation to prevent fellow officers from committing acts of brutality. Thus, officers who are in a position to prevent other officers from making an unreasonable seizure, but refuse to do so, are jointly liable to the victim for the resulting constitutional injury. *Fundiller* v. *City of Cooper City*, 777 F.2d 1436, 1441-1442 (11th Cir. 1985); *Webb* v. *Hiylel*, 713 F.2d 405, 408 (8th Cir. 1983); *Gagnon* v. *Bell*, 696 F.2d 17, 21 (2d Cir. 1982); *Bruner* v. *Dunaway*, 684 F.2d 422, 425-426 (6th Cir. 1982); and *Byrd* v. *Birshke*, 466 F.2d 6, 11 (7th Cir. 1977).

III. THE OBJECTIVE STANDARD OF REASONABLENESS ENUNCIATED IN *TENNESSEE* v. *GARNER* CORRECTLY MAKES ALLOWANCES FOR THE LEGITIMATE USE OF FORCE BY LAW ENFORCEMENT OFFICERS TO OVERCOME UNJUSTIFIED RESISTANCE AND IS CONSISTENT WITH THE TEXTUAL PROVISIONS OF THE FOURTH AMENDMENT.

The State of North Carolina, as *amicus curiae*, contends that the objective standard of reasonableness test set forth in *Tennessee* v. *Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), fails to consider the fact that a state or local officer has a right and duty to use force. Rather, the argument continues, *Garner* requires the

officer afford the violator an equal opportunity in a struggle and to exchange blow for blow with an offender.[2]

To the contrary, *Garner* clearly recognizes an officer's privilege to utilize sufficient force to overcome unjustified resistance and even extends the privilege to allow the use of deadly force under appropriate circumstances. *Id.* 471 U.S at ___, 105 S. Ct. at 1700-1701. *Garner* does, however, recognize that the privilege of law enforcement officers to utilize force is not unbridled and does not protect the use of that degree of force "not reasonably necessary to effect an arrest." *See Kidd* v. *O'Neal*, 774 F.2d 1252, 1256 (4th Cir. 1985).

North Carolina then contends that *Garner's* objective standard is one of simple negligence. This question certainly is not presented under the facts *sub judice*. Petitioner was not accidentally handcuffed, his head not negligently slammed into the hood of the car, nor was he inadvertently thrown into a police car by four of the Respondents. All of Respondents' acts of which Petitioner complains were intentional and deliberate acts—ones objectively unreasonable given the circumstances. Negligence is simply not at issue in this matter and Petitioner does not contend 42 U.S.C. § 1983 is concerned with negligent acts of an official causing unintended loss. *See Daniels* v. *Williams*, 474 U.S. 327, ___, 106 S. Ct. 662, 663, 88 L. Ed. 2d 662 (1986); *Smith* v. *Eley*, 675 F. Supp. 1301, 1304-1305 (D. Utah 1987).

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[2] Petitioner was not a violator or offender. "He was not even a pretrial detainee or a person under arrest. He was a free, innocent citizen, a man who had a responsible job with the North Carolina Department of Transportation. Unfortunately, he suffered from diabetes and occasional insulin reactions." *Graham* v. *Connor*, 827 F.2d 945, 950 (4th Cir. 1987) (Butzner, J. dissenting) (J.A. 67).

North Carolina, as *amicus*, contends that the standard for assessing constitutional violations should be identical under Fourth, Fifth, Eighth or Fourteenth Amendment analysis. This argument blatantly ignores clear textual differences inherent in the relevant constitutional provisions and numerous prior decisions of this Court. *See Terry* v. *Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Section 1983 contains no state of mind or heightened standard of misconduct requirements. *See Daniels* v. *Williams*, 474 U.S. at ___, 106 S. Ct. at 664. Any such requirement must be then derived from the specific constitutional provision involved. *Speight* v. *Jensen*, 832 F.2d 1516, 1521 (10th Cir. 1987). But clearly, conduct which constitutes an unreasonable seizure of an innocent citizen should not have applied to it the "rigorous standards" required by prisoners to demonstrate that they have been subjected to cruel and unusual punishment under the Eighth Amendment. *Graham* v. *Connor*, 827 F.2d at 950 (Butzner dissenting) (J.A. 67). Indeed, this Court has previously recognized that standards of conduct necessary to constitute a constitutional violation may vary, depending on the circumstances, even when applying the *same* constitutional provision. *Whitley* v. *Albers*, 475 U.S. 312, ___, 106 S. Ct. 1078, 1084-85 (1986). (Eighth Amendment standards vary between ordinary incarceration and prisoner riot situations). *See also Lafaut* v. *Smith*, 834 F.2d 389, 391 (4th Cir. 1987).

Both Respondents and the State of North Carolina ask this Court to superimpose a required heightened standard of misconduct in cases arising under 42 U.S.C. § 1983; presumptively, something more than *Garner's* objective standard of reasonableness and less than the state of mind requirement of 18 U.S.C. § 242. *See Screws* v. *United States*, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed.

1495 (1945); *Monroe* v. *Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961). North Carolina contends the heightened standard is needed because *Garner's* standard is an "amorphous" one which subjects police officials to a jury trial each time force is used in an arrest. This argument ignores the substantial protection afforded law enforcement officers under the doctrine of qualified good faith immunity which immunizes conduct which does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known . . . ." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818, 109 S. Ct. 2727, 2738 (1982). Qualified good faith immunity is a question of law to be determined by the Court, and thus provides a standard which allows lower courts to dismiss meritless claims and assures that officers will not be subjected to unnecessary litigation. *See Hall* v. *Ochs*, 817 F.2d 920 (1st Cir. 1987); *Dominique* v. *Telb*, 831 F.2d 673 (6th Cir. 1987); *Llanguno* v. *Mingey*, 763 F.2d 1560 (7th Cir. 1985) (*en banc*).

CONCLUSION

It is important to note that force, in the context of excessive force resulting in physical injury, as well as physical injury itself are not necessarily components of Fourth Amendment violations. The simple detention of an innocent citizen without probable cause or reasonable suspicion can constitute an unreasonable seizure even though no violent force is used or physical injury received. *Moore* v. *Marketplace Restaurant, Inc.*, 754 F.2d 1336 (8th Cir. 1983); *McKenzie* v. *Lamb*, 738 F.2d 1005 (8th Cir. 1983); *Gagnon* v. *Ball, supra; Harper* v. *McDonald*, 679 F.2d 955 (D.C. Cir. 1982). Clearly, under such situations the four factors of *Johnson* v. *Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033, 94 S. Ct. 462, 38 L. Ed. 2d 324 (1973), are wholly irrelevant, and the

use of any physical force merely aggravates the constitutional injury.

The State of North Carolina points to *Thompson* v. *Olson*, 798 F.2d 552 (1st Cir. 1986), *cert. denied*, 480 U.S. 908, 107 S. Ct. 1354, 94 L. Ed. 2d 524 (1987), as authority for the proposition that seizures such as those involved *sub judice* are not constitutionally actionable. *Thompson* is easily distinguishable because there the District Court found the officers to have had probable cause to arrest the plaintiff because they had received no information leading them to question whether he was suffering from an insulin reaction. *Id.* at 566-567. Further, the Circuit Court found that no excessive force was utilized in making the otherwise valid arrest. *Id.* at 553.

In the case at bar, even had Respondents reasonably believed Petitioner to be intoxicated, which is denied, no probable cause existed to arrest Petitioner for any criminal offense. *See* N.C. Gen. Stat. § 14-444 (Intoxicated condition only criminal when combined with specific disruptive behavior). Any reasonable suspicion which justified the initial investigative stop by Connor had long since dissipated by the time Petitioner was handcuffed and subsequently subjected to physical abuse. Thus, Respondents were not privileged to use *any* force against Petitioner, and the subsequent use of force by Respondents only served to exacerbate the unconstitutional seizure of the Petitioner.

The evidence, taken in the light most favorable to Petitioner, clearly sets forth a *prima facie* showing of unreasonable seizure in violation of the Fourth Amendment. Under these circumstances, it was error for the District

Court to deprive Petitioner of the opportunity to have a jury pass upon his claim.

Respectfully submitted,

*H. GERALD BEAVER and
RICHARD B. GLAZIER
Beaver, Thompson, Holt
& Richardson, P.A.
806 Hay Street
P.O. Box 53247
Fayetteville, NC 28305
Telephone: (919) 323-4600
Counsel for Petitioner
**Counsel of Record*

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